No. 3049

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLGA SUNDIN, and MARGUERETTE SUNDIN, IVER SUNDIN, and EUGENE SUNDIN, Minors, by OLGA SUNDIN, Their Guardian *Ad Litem*,

Plaintiffs in Error.

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation

Defendant in Error.

Brief of the Defendant in Error

Upon Writ of Error From the United States District Court for the District of Idaho, Northern Division.

RALPH S. NELSON,
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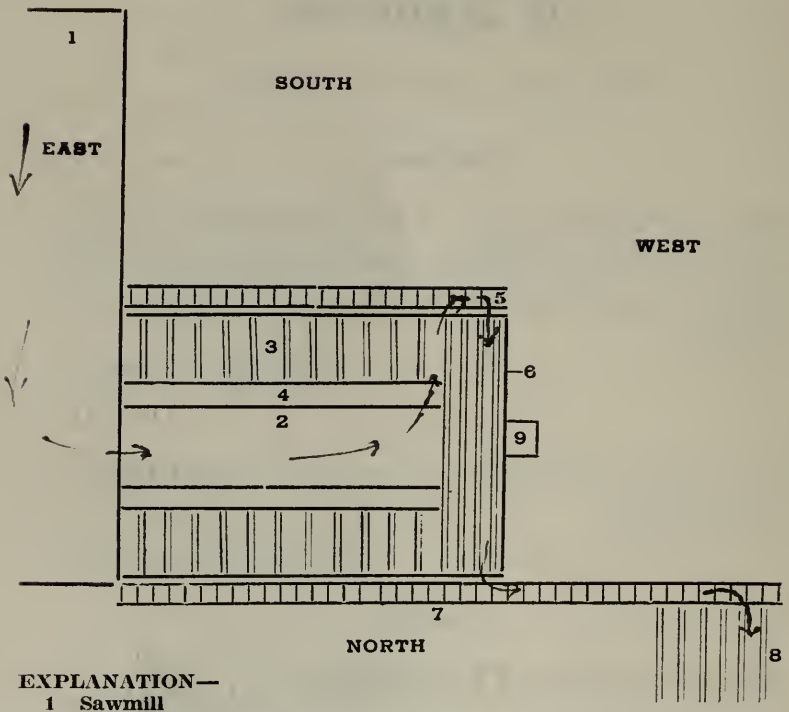
STATEMENT OF THE CASE.

To correct the many errors appearing in Plaintiff in Error's statement of the case, and to place the facts more in detail before the Court, we find it necessary to make an additional statement of the case and to assist the Court in getting a clear and correct idea of the relative location and direction of the mill, chain shed, short-tracks, transfer-tracks, and yard referred to herein, we have made a drawing, here

at the beginning, to show the location of the objects mentioned:



EXPLANATION—

1 Sawmill
2 Transfer chain
3 Twenty-two Short tracks.
4 Loading Platform
5 Transfer Tracks
6 Long tracks at West end.
7 Transfer track.
8 Tracks in Yard.
9 Moe's office at west end of platform.

The lumber comes from mill (1) along transfer chain (2) taken by men on (4) from off chain (2) and placed on cars standing on tracks (3) cars pushed from tracks (3) onto transfer car on track (5) transfer car with trucks of lumber on it moved opposite tracks (6) where the cars of lumber are pushed from off the transfer car across the platform on track (6) to another transfer car on track (7) and carried on transfer car on track (7) to tracks in yard (8).

It is necessary that the Court, at the beginning, distinguish between the trucks, sometimes called cars, and the transfer cars. The trucks, or cars, were 8

feet long, 2 feet high, and 48 inches in width. Lumber was loaded onto these trucks from the transfer chain and then the trucks or cars were moved a distance of about twenty-two feet and shoved onto a transfer car. The transfer car had two tracks on it running crosswise of the car which could be put in line with the tracks on the transfer platform, and the cars or trucks of lumber were thus taken from the transfer shed upon transfer cars out into the yard.

Andy Moe was the Foreman, having charge of the transfer chain, taking the green lumber from the chain, placing it on the trucks and transferring it to the yards where it was piled. He quit the employ of the Defendant in Error shortly after the accident complained of in this action and was the Plaintiff in Error's principal witness. He transferred Sundin from working on the tracks to transferring lumber from the shed to the yard by means of the trucks on April 3, 1916. Sundin worked at this employment until up to the time he was injured, May 16, 1916. His duties, in conjunction with Harry Brewsted and Knuteson, and sometimes with the assistance of the Foreman and others, were to push the loaded trucks of lumber from the transfer shed along the tracks thereon on to the transfer car, and to move the transfer car with the loaded trucks of lumber on it out into the yard. His duties were also to replace an

emptied truck from where they had taken the loaded truck. Whenever a truck was loaded sufficiently, this transfer gang would move it on to the transfer car from off the short-tracks and replace the loaded truck with an empty truck. The top of the load complained of and which fell in Sundin, was not to exceed 6 feet from the floor of the transfer platform, and not to exceed 4 feet from the floor of the truck. It consisted of 8 tiers of boards 6 inches wide, almost an inch thick and 16 feet long. These tiers consisted of the 6 inch boards piled one upon the other and whenever the chain-gang which loaded the lumber on to the trucks thought it necessary they would put cross-pieces or laths crosswise on the load to hold the tiers together, and then would again pile the 6 inch crosspieces one upon another. The loads of four and six inch boards require more crosspieces than boards ten or twelve inches wide. these crosspieces ordinarily projected from the side of the load, and when they did not project outside of the load they necessarily left an opening between the boards between which they were placed, so that a man standing by the side of the load could tell by a casual glance whether or not there were crosspieces in the load.

Sundin was a man of ordinary height, and, as I have stated, the top of the load was not to exceed 6 feet from the floor of the platform. All of the work

mentioned, the tracks, trucks, cars, places and appliances, were out-of-doors in the open daylight. The tracks on the surface or top of the transfer cars, were on a level with the tracks on the platform. As the transfer car had to be moved up and down along side of the transfer platform so that the tracks on the transfer car would be in line with the tracks on the transfer platform, there was some space between the ends of the tracks on the transfer cars and the ends of the tracks of the transfer platform, and neecessarily, when a truck of lumber was moved from off the tracks of the platform onto the transfer car there would be some shock or jar to the load of lumber. There were always a number of tiers on the trucks of lumber above the last crosspiece. Tiers or lumber would frequently fall from off a truck of lumber no matter how many crosspices were placed in the same, and no matter how level the track.

On the day of the accident, the deceased had begun work at 7 o'clock and had taken out a great many loads from the North side of the transfer shed. The Foreman, Andy Moe, had assisted Knuteson, Sundin and Brewsted to move the loads from the North side of the transfer shed. As they were going across the West end of this platform the foreman said to Sundin and Knuteson. "We will take out that load next", and pointed to this load, a part

of which afterwards fell. The foreman and men could see this load in question from the West end of the platform. There was no roof over this part of the work and it was out in the daylight. The load, therefore, that fell was open and obvious to the men moving it.

Sundin, Knuteson and Brewsted then went to move the truck of lumber in question which stood on the second track on the South side of the transfer shed from the West end of the same. A workman by the name of Olaf Higstrom, together with Knuteson and Brewsted got behind the car up against the transfer shed and pushed the same southward along the short-track towards the transfer car. The deceased stepped up to the truck of lumber in question, placed his back against the same at about the middle of the truck from end to end, took a hold of it with his two hands, and helped shove it up against the tracks on the transfer car. It would not go up onto the transfer car and they moved it back about 6 or 8 feet from the transfer car and again shoved it up against the transfer car, and it would not go up onto the transfer car this time. The deceased remained with his back up against the truck of lumber during all this time. They again took the truck back a few feet from the transfer car and again shoved it up against the transfer car and this time the

front wheels of the truck went up onto the transfer car and the upper part of the load slid off side-wise against the back of the deceased pushing him forward, falling on him in such a manner as to cause him injuries from which he afterwards died.

He was an experienced man in handling trucks of lumber and had worked at this same job for the Defendant in Error Company for six weeks.

Mr. Moe, the foreman, had often warned the men, including Sundin, to keep away from the sides of the loads. It was customary in all yards in the vicinity of the mill of Defendant in Error, for the men handling the trucks to observe themselves as to whether or not there were crosspieces in the load, or whether or not the load was solid on the truck, and that no matter how well a load may be loaded, occassionally a part of it will fall off.

There was no occasion or necessity for the deceased to place his back against the side of the truck of lumber. The ends of the tracks on which the particular load was being moved at the South side of the transfer shed, and next to the transfer car, were sunken so that they were something like an inch and one-half below the level of the tracks on the transfer car.

In the Plaintiff in Error's Complaint, it was

alleged in Paragraph 17 thereof, that while Sundin knew of the difference of the height of said transfer car, and the necessity for violent and extraordinary movement of said car, in order to overcome the obstruction, caused by the difference in height, he complained to the said Foreman, Ed. Moe, of the condition of said track and transfer car, and the necessity for the violent shoving of said car of lumber upon said transfer car, which complaint was made to said Ed. Moe, immediately upon being ordered to go around and assist in the movement of said car of lumber, and said Moe, as foreman, promised said Sundin that the same would be repaired in a few days.

The evidence shows that deceased Alex Sundin, was warned a number of times to keep away from the side of the cars. On account of the lumber being apt to fall over he should have stayed away from the side of the cars at all times, but as the evidence shows even if the track on the platform and the track on the transfer car was in line and perfectly level there would be a short open space between them, and our ordinary intelligence teaches us that there would be more or less of a jar in going across this opening, and in a heavy truck of lumber moving from a stationary platform onto a movable transfer car. The plaintiff did not heed the warning to keep away from the side of the car but assumed a dangerous

position at the side and remained in such dangerous position after there had been two severe shocks to the car.

PLAINTIFF'S ALLEGED GROUND OF NEGLIGENCE.

Reading plaintiff's complaint only two grounds are set forth:

1 It is alleged that the falling and collapsing of the lumber pile from said car was due wholly and exclusively to the negligence of the defendant in the manner in which said load was piled on said car, in that no cross pieces were inserted between layers of lumber of said car (page 12 of the Transcript.)

2. It is allegel that the tracks on the transfer car were higher than the tracks on the transfer platform, and that said condition was one of the contributing causes of the death of Alex Sundin. That Sundin knew of the defect and had complained of the same to the foreman Andy Moe. (Page 14 of Transcript.)

ARGUMENT.

IT APPEARS FROM THE UNCONTRADICTED TESTIMONY OF BOTH PLAINTIFF AND DEFENDANT THAT THE ACCIDENT COULD HAVE OCCURRED IF THE MANNER IN WHICH IT DID, EVEN THOUGH THE TRACK HAD BEEN SMOOTH AND THERE HAD BEEN CROSSPIECES IN THE LOAD OF LUMBER. IN OTHER WORDS, IT APPEARS FROM THE PLAINTIFF'S EVIDENCE THAT PARTS OF LOADS OF LUMBER DO FALL OVER IN ALL YARDS EVEN THOUGH THE TRACKS ARE LEVEL AND CROSS PIECES ARE INSERTED IN THE LOADS.

In regard to the above contention of the defendant, we desire to call the court's attention to the fact that the lumber comes out from the mill on an endless chain and that on each side of this endless chain there are about seventy tracks running at right angles from said transfer chain upon which cars or trucks are placed. The men working on the transfer chain lift the lumber moving thereon onto these cars. The lumber is piled onto these trucks or cars only for transportation to the yard. The cars have only a short distance to go and the lumber necessarily has to be piled onto them and taken off in a reasonably rapid manner. The trucks

are only two feet high from the track upon which they run and the highest the loads are permitted to be is about six feet from the ground. The moving of these trucks along the track would appear to be a very simple operation. The top of the loads come to about the height of a man's head. The men work from behind the loads pushing them. Mr. Moe was the plaintiff's principal witness and testified as follows (P. 102, tr------):

Q. Is it not a fact that always above the last cross piece there are a number of pieces that are not held by anything?

A. There should be, but sometimes there will be only a few boards sometimes; if the transfer men think the load is big enough they will take it out, even though the cross pieces are right on the top.

Q. But usually there are a number of tiers above the last crosspiece?

A. There should be, and usually is.

Q. Is it not a fact that a board may fall off, no matter how well a load may be loaded?

A. Yes, and it might fall off, no matter how they were loaded. I have seen that.

Q. And a tier of a load or the top of the two tiers or three tiers might slide off of a load?

A. I have seen that, too.

Q. That is a thing that may happen in any yard, is it not?

A. Yes, it might happen in one yard as well as another.

Q. And that is one of the things that the men of experience moving trucks guard against, is it not?

A. Yes, it is the same as any other kind of work; it don't make any difference what it is; they have got to look for something.

* * * * * * *

MR PLUMMER: Q. Mr. Moe, counsel asked you if sometimes lumber didn't fall off from these cars. Now in moving this car of lumber, of the kind that was being moved when Sundin was hurt, and the distance it was being moved before it came to this end of the track that we claim was out of repair before it came to that, and being shoved along as has been described here, what would cause the lumber to fall off, going that distance, under those circumstances?

A. I couldn't tell.

Q. Do you know of anything? A. No.

MR. NELSON: But it will sometimes do it, won't it, Mr. Moe?

A. Certainly it will.

There is no evidence introduced upon the part of either plaintiff or of defendant that would contradict the above statements in any respect. It must appear to the court that it could not be otherwise in moving upon a track a car of lumber such as was being moved at the time of the accident. The truck was forty-eight inches wide and on this truck there were eight tiers of six-inch boards, piled fifty-five boards high. The falling over or tipping over of such tiers from the truck would be one of the risks

incident to the work in which plaintiff was employed. To show the probability of such a load falling over as the one in question did fall, we quote from the plaintiff's evidence, which was uncontradicted, appearing on page 90 of the transcript:

> Q. How many (referring to crosspices) were usually put in these loads that fell—of the size that fell on Mr. Sundin?
>
> A. Maybe two, maybe four, or maybe five or six.
>
> Q. What would determine the difference, as to the number, just describe that, will you?
>
> THE COURT: Why do you have more sometimes than others?
>
> A. Because this narrow lumber is very easy to fall over.
>
> MR. PLUMMER: Q. And what are the widths of the lumber, what are the usual widths? What do you mean by narrow lumber and wide lumber.
>
> A. One by six is narrower than one by twelve, and easier to tip over.
>
> * * * * * * *
>
> Q. What was the width of the lumber that fell over on Sundin?
>
> A. One by six.

It is therefore the defendant's first contention that the falling over or the collapsing of the truck of lumber was one of the risks incident to plaintiff's employment, and that as the truck of lumber is small and everything about it open and obvious and

all of the work in connection with it out in the daylight, and that since loads of lumber would fall without any negligence up on the part of the defendant or its employees, it is therefore the contention of the defendant that the falling of the lumber as it occurred in this case was a risk incident to the employment of plaintiff.

PLAINTIFF KNOWING THE TRACKS TO BE UNEVEN ASSUMED THE RISK OF THE LUMBER FALLING OVER.

We have shown that in paragraph seventeen of plaintiff's complaint that it is alleged that plaintiff knew of the uneveness of the track and had made complaint of the same to the foreman. In the trial of the case it was stated, however, that he was unable to prove that complaint was made to the foreman. It therefore stands that plaintiff knew of the unevenness of the track. Since he did know of the unevenness of the track and since loads of lumber were apt to fall over even under the best of circumstances, then certainly he assumed the risks of the load falling over on account of running up against the obstruction in the track, to-wit, the unevenness of the track of the platform and transfer car.

The load in question was shoved three times by the deceased and his associates against this obstruction. These tiers of lumber fifty-five boards high on

account of such a jar would necessarily be apt to fall off. The plaintiff of course knew of these facts, and we do not see how the court can get away from the conclusion reached by Judge Deitrich, and we quote from his statement to the jury when the case was taken away from the jury in the lower court:

> 'The other negligence referred to, as I have already stated, is that the track at this particular point was permitted to get out of order and become a little lower than the other track, some testimony tending to show that it was in the neighborhood of an inch and a half lower. It is alleged in the complaint that the deceased knew of this faulty condition or defective condition of the track, and that he said something to the company, or an officer of the company, about it, at least that he knew of it, but whether that has been alleged or not the evidence would seem to leave no doubt that he did know of it, for as testified to by the several witnesses, when they started to put this truck load of lumber upon the transfer car, it met with this obstacle; they pushed it forward until it reached the track on the car, and it would go no further, and they pulled it back to give it a start, and again tried, and they did this at least twice, and I think some of the testimony shows that they did that three times. And it is further shown that he was at the side of the car, had a hold about the middle of the car or truck, so that even had he not made this allegation in his complaint the inference would be inevitable, unavoidable, that he knew of the obstruction there, and I can't escape the conclusion that it must appear to all that he, with his age and experience, and apparent intelligence, must have been able to appreciate what would be obvious to a child, that rolling this heavy truck against the two projecting ends

of the rails would jar the truck—that must have been appreciated by him,—and that the jar would tend to dislodge the lumber, that is, it would give a shock to the lumber, and if any of it was loose it might fall off,—not that it would, but it might so that, as an intelligent man, he was bound to take cognizance, knowing of the obstacle there, the projection over which the wheels had to roll, it was incumbent upon him to take knowledge that there would be some danger, and to protect himself against the danger. That isn't necessarily saying that he knew that this lumber was not properly bound by the cross ties. I do not make any such suggestion as that at all. But he was able to appreciate the fact that rolling this heavy truck load of lumber against the projecting ends of the rails upon the transfer car would give the truck a shock which would tend to dislodge the load being carried upon the track."

It seems to us that our first two contentions should decide this case and that even though the plaintiff had been guilty of no negligence whatever still he would be barred from recovery in this case. However, as our third contention we assert that under the law and the uncontradicted evidence of the plaintiff and defendant in this case the *plaintiff was guilty of contributory negligence in working at the side of the car, since he knew of the defective condition in the track and since he was warned not to work at the side of the load.*

The testimony as to the warning against working at the side of the load is as follows (Testimony of plaintiff's witness Andrew Moe, page 101, tr.):

THE COURT: I want to ask the witness a question. You spoke of warning these men from time to time as you saw that a load didn't seem to be quite safe. Is that more or less of a common thing, that a load wouldn't be quite safe?

A. Yes, sir, so far as I have seen in the lumber yards, it is a common thing that there are some loads that are not safe.

* * * * * * * * *

THE COURT: (Testimony of same witness, page 41 tr.) Well, if the cars are so close together as that, how does a man get to the side of the car to push it?

A. They ain't supposed to go alongside of it. They are supposed to go behind it and shove it up.

MR. NELSON: (Testimony of same witness, page 97, tr.) I understood you in answer to Judge Dietrich's question, to state that there were no rules down there about working around these loads. I will ask you whether or not it is a fact that you often warned the men working under you to keep away from the sides of the loads?

A. Yes, sir.

MR. NELSON: Is it not a fact, Mr. Moe, that on several occasions you warned the deceased, Axel Sundin, to keep away from the side of the load?

A. I warned them all, I believe, numbers of times.

Testimony of Joe Freitag, page 106 of transcript:

Q. I will ask you whether or not you and

he (referring to deceased) ever had any conversation as to the danger of getting alongside of a load of lumber?

A. Yes.

Q. What did he say to you in that regard?

A. It was in the morning, the first time, on the day shift. I worked with him on the day shift, and we were taking the car out, the first truck, just the first time. I will show you. I go to the side here and push it out, the truck, and Mr. Sundin—from the chain—

Q. Just tell what he said to you.

A. He worked there, and he said, "Joe, come back; on the side is too dangerous."

Q. You were at the side of the truck of lumber, were you?

A. I stand there.

Q. You were partly at the side of the truck? A. Yes.

Q. And Mr. Sundin said, "Joe, get away; it is too dangerous?" A. Go back—

MR. PLUMMER: We object to that as leading.

THE COURT: He said, "Joe, go back; it is dangerous?"

MR. NELSON: Q. He said, "Joe, go back, it is dangerous?"

A. Yes.

Q. State whether or not, shortly after that, any other person in Mr. Sundin's presence warned you about the danger of working alongside of a truck of lumber? Answer that yes or no.

A. A short while after come Mr. Moe, after

the warning came Mr. Moe out there and Moe crossed to me, and he said, he tell me, "Freitag, don't push the truck from the side; it is too dangerous." He give me that advice.

* * * * * * *

THE COURT: Was Mr. Sundin there when Mr. Moe said that or not?

A. Yes, Mr. Sundin, first, he warned me.

THE COURT: Yes, but when Mr. Moe said that to you where was Mr. Sundin?

A. Behind this truck.

* * * * * * * *

MR. PLUMMER: (p. 111, tr.) Moe testified that he told them not to push on the side there when it looked dangerous.

THE COURT: But that isn't what this witness testified. He testified that the deceased, that Moe told him not to push from the side of it because it was dangerous. He didn't say why.

* * * * * * * *

Q. (By Mr. Plummer) When you say that Sundin told you not to push on the side where was Sundin then?

A. Where was he?

Q. When he told you that. A. Close to me.

Q. And where were you? A. Outside.

Q. Down here?

A. Oh, no, right here. I took it here from the corner and push, and he said, "Joe, go away; outside is dangerous."

* * * * * * * *

Q. You mean that was the first morning you went to work?

A. No, this day the first time.

Q. When was this, how long before he was killed?

A. One week before.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE—NOT ONLY BECAUSE HE WORKED ALONG SIDE OF THE LOAD OF LUMBER WHEN HE KNEW THE TRACK WAS UNEVEN, AND CONTINUED TO DO SO AFTER THERE WERE TWO SEVERE JARS TO THE LOAD OF LUMBER—BUT BECAUSE HE SHOULD HAVE OBSERVED THAT THERE WERE NO CROSS PIECES IN THE LOAD OF LUMBER.

The uncontradicted testimony of both plaintiff and defendant shows that deceased could have observed, had he used ordinary care, that there were no crosspieces in said load of lumber. The evidence shows that Andrew Moe, the foreman, the deceased and two other men, had taken a truck load of lumber to the yard and had returned to the west end of the transfer platform and when they were about opposite the little office marked "9" in the drawing in our brief, Mr. Moe, the foreman, said: "We will take that load next," pointing to the particular load that afterwards fell. It therefore follows that this load could have been observed as far away as the west

end of the transfer platform. Mr. Moe, plaintiff's witness, testified (p. 98, tr.):

> Q. Do you remember as you were going across the west end of this platform, that you said to Sundin and Knudson and Brewsted, "we will take out that load next," and pointed to this load that afterwards part of it fell?
>
> A. Yes, I did.
>
> Q. Then you could see that load from the west end of the platform at that time?
>
> A. Yes, sir, we could see it.
>
> Q. It was all out in the daylight, all of this work?
>
> A. Yes.
>
> Q. No roof over where they were working or anything?
>
> A. No, not where they were working, no.
>
> Q. I will ask you if it is not a fact, Mr. Moe, that there are ten tracks west of the west end of the chain shed, out here?
>
> A. Yes, sir.
>
> Q. And out at the end, at this west end of this platform, there is a little office is there not?
>
> A. Yes, sir.

It is apparent, therefore, that there was nothing between this load and the men as they approached it and that it could be seen while they were approaching it for a distance of thirty feet or more. They approached it, as will be seen, from an examination of this diagram, from the side that afterwards fell onto Sundin.

The plaintiff's witness, Mr. Moe, testified that the absence or presence of these crosspieces could be observed by a casual glance at a load of lumber. We quote from his testimony (p. 38, tr.):

> Mr. Moe, when a man of ordinary experience in handling lumber or trucks of lumber is at the side of one of those trucks of lumber such as the one complained of in this case, can he tell by casual observation of that load of lumber whether or not there are any crosspieces in the load?
>
> A. I don't know whether anybody else can tell, but I could generally tell by a glance of the eye.
>
> Q. Could the ordinary man who had had experience in loading lumber and shoving these trucks for a month or six weeks or longer tell by a casual examination of it from the side of it as to whether or not there were cross pices in that load?
>
> A. He could if he thought of it and looked for them.
>
> Q. If he had thought of it and looked by a casual glance at the load he could have told? A. Yes, sir.

As a matter of fact the plaintiff's attorney Mr. Plummer, in the trial of the case in the court below, admitted this to be true. And we quote from some of the testimony of Harry Brewsted, one of the plaintiff's witnesses (p. 69, tr.):

> Q. Ask him if Sundin could not have turned his face around and looked at the side of that

car of lumber and have seen whether or not there were crosspieces in the load?

MR. PLUMMER: We object to that as calling for the conclusion of the witness.

THE COURT: Yes, I think the jury is just as competent to answer that question as he is.

MR. NELSON: Only he has worked around these cars all the time.

THE COURT: But isn't it obvious that the deceased could have seen it if he had turned around to look for it?

MR. NELSON: Well, if it is obvious, that it—

MR. PLUMMER: We admit that.

MR. NELSON: Q. Whenever these crosspieces were in the load there was an opening between the boards, was there not?

THE COURT: That must necessarily follow.

As a matter of fact the plaintiff admits, and the evidence shows, that the deceased had his back to the load of lumber during all of the time that he was moving it, but the mere fact that he turned his back to the load will not excuse him from failing to observe whether or not there were crosspieces in the load or whether or not the load appeared safe. This testimony was borne out by the uncontradicted testimony of the defendant's witnesses, and we will quote from only one, that of John Salsberg (p. 120, tr.):

Q. I will ask you whether or not, Mr. Sals-

berg, a man of experience, from the side of a truck, can tell by a casual glance at that truck whether or not there are crosspieces in the truck of lumber?

* * * * * * * * * * *

A. When there is crosspieces in the load they can see that all right.

Q. He can see if there are crosspieces in the load? A. Yes.

It will appear from the testimony that sometimes these lath or crosspieces were put in the load straight across and projected out some inches to the side, and at other times they were put in in such a manner that they came only to the side of the load, but as has been shown, when they came only to the side of the load the fact that they were in there caused an opening to exist in the layer of boards and thus made the fact obvious to anyone as to whether or not there were crosspices in the load. The evidence in this case shows that the load was moved three times before it was gotten upon the raised track of the transfer car, and yet with this load fifty-five boards high the plaintiff is contending that he should be excused from failing to observe as to whether or not there were crosspieces in this load. As a matter of fact they had to pull the car back a number of feet to get a start and, of course, the momentum of the load going up against this obstruction must have caused a considerable jar, and it seems to us that any

ordinarily prudent man would have turned around and taken a casual glance to see whether or not the load continued to be safe. We quote from the testimony of Harry Brewsted (p. 64, tr.) one of plaintiff's witnesses, to show the first time the car went up against the obstruction it had gone a distance of twenty-two feet, the entire length of the track from the transfer shed to the transfer car, and necessarily had great momentum.

Q. As nearly as possible, tell me where the car was that you were pushing when you first turned and looked towards it?

A. He says when it stopped by the transfer car the first time.

Q. When it stopped by the transfer car the first time?

A. Yes.

Q. Had the car been going all the time from the time you first began shoving on it until it went upon the transfer car?

A. Yes.

Q. How many times did you push it up against the transfer car?

A. Three times.

* * * * * * * * * *

Q. How long a time did it take from the time you began shoving the car away from the transfer shed, was it until Sundin was injured?

A. About three minutes.

We think it also must be apparent to the court

that plaintiff was guilty of contributory negligence in working alongside of the car of lumber and continuing to work there for a period of three minutes when he could have told by a casual examination as to whether or not there were crosspices in the load. We think he would have been guilty of contributory negligence had he worked alongside of the load of lumber, even though there had been crosspieces in the load, for the reason that it appears from the testimony of all the witnesses that the number of crosspieces varied from two to six, and as the loads were apt to fall even though there were sufficient number of crosspices in the load, his negligence is conclusive when it is remembered that three times this load was taken and run up against the obstruction and the deceased continued to stay at the side of the load.

THE EVIDENCE SHOWS THAT PARTS OF THE LOAD OF LUMBER WOULD FALL OFF WITHOUT ANY NEGLIGENCE ON THE PART OF THE DEFENDANT AND EVEN WHEN THE TRACK WAS LEVEL, THEREFORE THE DECEASED WAS CONCLUSIVELY GUILTY OF CONTRIBUTORY NEGLIGENCE WHEN, KNOWING THE FACT THAT THE TRACKS WERE UNEVEN, HE TOOK A DANGEROUS POSITION WITH HIS BACK

AGAINST THE LOAD OF LUMBER AND REMAINED IN SUCH DANGEROUS POSITION AFTER THE TWO JARS TO THE LOAD, WHICH OBVIOUSLY WOULD WEAKEN IT.

In his opening statement plaintiff stated to the jury that at the time he was injured he had his back up against the load of lumber. The witness, Harry Brewsted, on the part of plaintiff, stated (p. 65, tr.) that when the load was being shoved Sundin worked at the side of the load with his back to the load. We have shown elsewhere in our brief that the men were instructed and warned by their foreman not to work at the side of the car. We have shown by the fellow-servant of Sundin, which is undisputed, that Sundin himself had instructed this witness not to work at the side of the car on account of the danger from the load falling off onto him, yet it is admitted in this case that Sundin worked with his back to the load for three minutes during which time the load of lumber was with a good start shoved up against the obstruction in the track which necessarily caused a great jar to the load. The undisputed evidence in this case not only shows that men were warned not to work at the side of the load but that a reasonably prudent man would not work with his back up against the load as did the plaintiff in this case at the time he was killed. We quote from witness Salesberg (p. 121, tr.):

Q. I will ask you, Mr. Salesberg, in your opinion, whether or not a reasonably prudent man of experience in moving trucks of lumber would go along the side of the truck of lumber composed of six inch white pine an inch thick, and sixteen feet long, and piled from fifty-four to fifty-five tiers high, at least from fifty to sixty tiers high, when there are no crosspices in it, and place his back up, get in the middle of the truck of lumber, and attempt to assist in moving it?

A. No, sir.

It must appear to the court that this man unnecessarily and foolishly and unfortunately voluntarily assumed a dangerous position and continued therein when the dangers were added to by the jar that the load was subjected to in moving it. The evidence shows that the place the men were to work was at the rear end of the car. (pp. 44, 97, 106,107, 111, 120, 121, 132).

THE EMPLOYEE WHO FAILED TO PUT IN THE CROSSPIECES, IF THERE WERE SUCH FAILURE, WAS A FELLOW SERVANT OF SUNDIN.

The evidence in this case is that the boards came out from the mill on an endless chain and were taken off the endless chain by an employee of the defendant and placed upon the truck. He was instructed to put in crosspices in each load of lumber. The deceased Sundin and his associates took the

load of lumber and pushed it a short distance into the yard. They could have complained to the chainman at any time that he was not putting in a sufficient number of crosspieces. They came in contact with him and were simply assisting in carrying the boards a little further from the mill. It was one continuous operation of taking the boards from the mill to the yard. All these men were under the same foreman, and certainly were fellow servants under the decisions of the courts of the state of Idaho. The master furnished sufficient crosspices to the chainman and if there was a failure to put the crosspieces it was a detail of the work that the master could delegate. We quote from the witnes Moe (p. 38, tr.):

> Q. Now in regard to those crosspieces—the men working up on the chain shed put in the crosspices on the load, did they not?
>
> A. Yes, sir.
>
> Q. And where were these crosspieces kept, so that they could get them and put them in these loads?
>
> A. They were kept overhead, different places, where they would be handy to get them.
>
> Q. Convenient to where they worked?
>
> A. Convenient to where they worked.
>
> Q. There was a supply kept on hand all of the time, and whenever they wanted one or thought one ought to go in the load they could get it and put it in the load?
>
> A. Nearly all the time they were there.

In the case at bar the failure to put in crosspieces was simply a detail of the operation and the master having furnished sufficient crosspieces and instruction to use them, and having delegated this detail to an employee, he is not liable for such employee in an isolated instance because he failed to put in crosspieces. The Supreme Court of Idaho in a case involving signals has sustained this doctrine, Weisner v. Bonners Ferry Lumber Company, 29 Idaho, 526. The Court says on page 539 of its opinion:

> "This Court held in Larsen v. La Doux, 11 Idaho 49, 81 Pac. 600, that if the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance by the servant to whom it is intrusted; but if it is one pertaining only to the duty of an operative, the employee is a fellow-servant with his colaborers of whatever his rank, for whose negligence the master is not liable; that, in short the master is liable for the negligence of an employee who represents him in the discharge of his personal duties to his servants, and beyond this he is liable only for his own personal negligence."

Under the Idaho authorities cited herein it clearly appears that the employee whose duty it was to put crosspieces in the load of lumber was a fellow servant of deceased. If it is A's duty to take the boards from off the transfer chain and hand them to B, whose duty it is to carry them and hand them to C to pile up in a yard, they are clearly carrying on a common enterprise and are fellow servants. They

all work in close proximity to each other and necessarily could complain to each other of any defect that might arise. If it is A's duty to take the boards from off this transfer chain and pile them on a table and it is B's duty to lift them and hand them to C to pile in the yard they are still fellow servants. And if it is A's duty to take the boards from off the transfer chain and pile them on a truck and it is B's duty to push the truck out into the yard to where C piles them, they are none the less fellow servants.

AUTHORITIES AS TO FELLOW SERVANTS.

In the case of Larsen vs. LaDoux, 11 Idaho 49; 81 Pac. 600. The Supreme Court of this state has well defined the fellow servant doctrine within the state. In that case some contractors were building the Elk's Temple in Moscow. The plaintiff was employed with one K to furnish mortar and brick to the brick layers. One B was the manager in immediate charge of the construction of said building for the contractors. After the brick work on the Northerly side of the building was completed it was necessary to erect a scaffold across the west end of the building for the use of the brick layers. B directed K to erect such scaffold, and in doing so it was necessary for him to put in place two joists or crosspieces on which to lay the floor of the scaffold.

From a lot of material furnished for that purpose, he selected two pieces, and one of the brick masons nailed the ends thereof in place. Thereafter B and K laid some boards on said scaffold and thereafter the plaintiff assisted K in completing the erection thereof. B directed K to lap the ends of the floor across the joists, which he neglected to do. Thereafter the plaintiff and K placed a considerable quantity of mortar and bricks on said scaffold and the section supported by one of the cross-pieces fell, the cross-piece having broken and in the fall the plaintiff was injured. Held, that if there was negligence or carelessness in placing a defective crosspiece in said scaffold, it was the negligence and carelessness of a fellow servant and that the employers were not liable therefor.

In this case is was held that having furnished safe material for the erection of said scaffold and having directed K to construct it safely, the contractors were not liable for the carelessness of K in constructing the same.

This case has been repeatedly approved by our State Supreme Court and was so approved by the late case of Wiesner vs. Bonners Ferry Lumber Co., 29 Idaho 526; 160 Pac. 647, and while this case has specific reference to the giving of signals, it is fully in point in reference to the failure of a servant, no

matter what his rank may be, in failing to put in crosspieces in the load when this is a detail of the work.

The Circuit Court of Appeals of the Eighth Circuit in the case of Woods v. Potlatch Lumber Co., 213 Fed. 591, has settled the question in this case as to fellow servants. In that case A was working at the bottom of a burner repairing the brick work and was under the direction of a foreman B. C was working on a conveyor under the directions of foreman D. C carelessly threw some boards from where he was working and injured A. Held, that C and A were fellow servants.

The Larson v. LaDoux case was also approved in the case of Coulston v. Dover Lumber Co., 28 Ida-396, which held that the head sawyer and tail sawyer were fellow servants, and we submit that if the man who saws the logs into boards is a fellow servant with the man who first handles these boards, the man who first handles these boards is a fellow servant with the next man who handles these boards in piling them into piles and who in turn is a fellow servant with the next man who takes the piles of boards and shoves them onto a transfer car.

The doctrine of fellow servant as applied by the Supreme Court of Idaho in Snyder v. Viola Mining & Smelting Co., 3 Idaho, 28 Pac. 127, is

in point in that case. S was a miner engaged in underground work and G was a blacksmith engaged in sharpening tools for the men working underground. It was held that G and S were fellow servants.

In the case of Fraser v. Red River Lumber Co., 47 N. W. 785, the court said:

> "All the men employed in the lumber yard, whether piler, scaler, sorter, or measurers, altho engaged in different departments of the work, were all in the employment of the same general control, and engaged in promoting the same common object. All the different branches of labor, including the piling, were parts of the common everyday work of the yard. The making of the piles, including the projecting steps, was itself but a part of the work these men were employed to perform; and all who were engaged in that yard, whatever the particular line of their services were to each other, and as to every part of the common enterprise which they were promoting, fellow-servants. Hence the defendant is not liable to the plaintiff for the negligence of those who pile the lumber."

See also Sec. 1423, note (r), page 4089, of La Batt's Master & Servant, where the authorities are gathered at length upon this question.

CASES CITED BY PLAINTIFF IN SUBMITTING DOCTRINE OF ASSUMPTION OF RISK.

We will not discuss separately each case cited by the plaintiff in his brief, but since he seems to have

relied on this case in particular we desire to call the Court's attention to wherein it differs from the case at bar. The plaintiff says that the case of Gaudie v. Northern Lumber Company, 34 Wash. 34, 74, Pac. 1009, seems to be on all fours with the case at bar. We desire to call the Court's attention to the fact that in the case at bar the injury occurred out in the open daylight where everything was open and obvious, and where the plaintiff as he alleges, knew of the unevenness of the track, and the only defect he claims not to have been aware of was the absence of crosspieces in the load of lumber. In the Gaudie case cited by the plaintiff the men were working in a dry kiln. It seems there were no windows and the only light entering the kiln came through the doorway. A number of men were working around the car further interfering with the light so as to prevent the men from seeing where they were working. On account of the hot air in the kiln, the men had to work unusually rapid so as to get the fresh air. There was not a solid floor and they had to especially watch where they were walking. In that case the injured man was not working at his regular occupation, but was called in from the open where it was light suddenly into the dark kiln It must be plain to the Court that the Gaudie case is not in point at all except that the car of lumber and the track are being used in both cases. The facts

surrounding the Gaudie case were entirely different from the case at bar. In the one case the defects were not open and obvious and in the other case they were open and obvious. In one case the work was being carried on in a dark kiln where the men were working at an unusually rapid pace and in the other case the men were working at their usual rate of speed out in the open daylight.

DEFENDANT'S CONTENTION AS TO ASSUMPTION OF RISK.

1st. In this case it is the contention of the defendant that if the defendant was negligent in maintaining an uneven track, the plaintiff knew of the same, as is shown by the allegations of this complaint.

2nd. If the defendant was negligent in not putting in cross-pieces on the loaded truck of lumber, the plaintiff knew that there were no cross-pieces in the truck of lumber, and therefore assumed the risk, or if he did not know of the absence of the cross-pieces, the failure to put them in was the negligence of a fellow servant of the plaintiff and therefore the risk was assumed by the plaintiff.

In the case of Knauf v. Dover Lumber Co., 20 Idaho, 773, our court says in paragraph six of the syllabus:

> "A servant in accepting employment assumes the ordinary risks incident to such employment, but the servant does not assume such risks as arise out of the negligence of the master unless such risks are known to the servant or are of such character that by the exercise of ordinary care upon the part of the servant he could have known the same."

In the case of Goure v. Storey, 17 Idaho 352, our Supreme Court held that plaintiff in that case assumed all ordinary risks incident to the work in which he was engaged and that these included the risks that were obvious and patent, as the machinery was of the most simple kind and easily understood by one of ordinary understanding. The court in its opinion quotes from the case of Rush v. Mo. Pac. Ry. Co., 36 Kan. 129 and says:

> "What the servant may lawfully do, without negligence, the master may lawfully hire him to do, without negligence. The master cannot be bound to take greater care of the servant than the servant can of himself. If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence, then same facts and the same reasoning which would show this would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There can be no negligence on the part of the one and not on the part of the other, where both are capable of understanding the danger and both are fully informed as to all of the facts."

A truck of lumber is about as simple a device as

a man could work with, and a man handling and pushing the same is better qualified to tell whether the lumber is piled on in a safe manner, than any other person, and can tell by casual glance whether or not there are crosspieces in said truck of lumber, and whether or not the same is firm.

In the case of Deaton v. Abrams, et al, 110 Pac. 615, the Supreme Court of Washington in considering a case where a person was injured by the falling of a pile of lumber which he was directed to saw up, says:

> "Where plaintiff had worked about wood yards for four or five years, and about the one in which he was injured for more than one year, and knew the conditions of his employment, and that a pile of wood 4 feet wide and 18 feet high, which he was directed to saw, but not to put his saw in a dangerous position, was dangerous and liable to fall, he assumed the risk of a dangerous position near the wood pile, so that his employer could not be liable for his injuries resulting from the wood pile falling.
>
> "While a servant may rely on the duty of the master to provide a safe place in which to work, yet if he fails to discover such a defect as is apparent, if he used ordinary diligence to discover it, he cannot recover for injuries resulting from such defect.
>
> "Where the danger is as obvious to the servant as to the master, both are upon an equality, and the master is not liable for an injury resulting from such danger."

In the case of Smith v. United States Lumber

Co., 77 S. E. 330, the Supreme Court of West Virginia in considering a similar case says:

> "Moreover, all that situation was as obvious to plaintiff as it was to defendant. It was only an ordinary situation which any man of discretion could understand in all its relations. Plaintiff could see as much danger in it as defendant had knowledge of. The liability of the lumber pile to fall was as apparent to plaintiff as to defendant. Where the servant is of sufficient discretion to appreciate the dangers incident to the work, and has equal knowledge with the master of the dangers, he takes the risk therefrom upon himself."

The Supreme Court of Iowa in the case of Brooks v. W. T. Joyce Co., 103 N. W. 91, holds, in a case similar to the one at bar, that the employe assumed the risk of the falling of the lumber and in that case says:

> "The proprietor of a lumber yard, who allows lumber to be piled in such manner as to be dangerous to his servants is negligent in failing to furnish a safe place to work, though the lumber was originally so piled by employes for whose negligence the master would not be responsible.
>
> "A servant employed in a lumber yard, who knew that the manner in which certain lumber was piled was dangerous, in that the pile might fall over, could not recover for an injury from the pile falling on him, he having assumed the risk.
>
> A servant employed in a lumber yard, and who knew that the manner in which certain lum-

> ber was piled was dangerous, in that the pile might fall over, was guilty of contributory negligence in attempting to take lumber from such pile."

In the case of Coulston v. Dover Lumber Co., 28 Idaho, 390, 154 Pac, 636, our Supreme Court held that where an employee has full knowledge of the unsafe condition of the premises or appliance and with which he has to work, he is deemed to have voluntarily assumed the special risk incident to such employment, subject however, to the exception that in case the servant notifies the master of such unsafe condition and objects to continuing work under the special risk incident thereto, but is induced to continue working under such risk by a promise of the master to remove the danger within a reasonable time, the servant does not thereafter assume the risk during such time. The Supreme Court however, said:

> "In such cases the servant is deemed to have no cause of action unless he proves that his reliance on the promise of the master was the moving consideration for his consent to continue subjecting himself to such special risk."

In this case is was held that the accident was caused by the negligence of a fellow servant, and the judgment of the lower Court was reversed, the Court holding necessarily that the negligence of a fellow-servant was one of the risks assumed by the servant.

PLAINTIFF'S CASES ON THE DOCTRINE OF CONCURRENT NEGLIGENCE.

We are surprised to find that upon examination of the cases cited by the plaintiff to sustain their doctrine of concurrent negligence there is not a case cited by them in their brief under this heading (pp. 48 to 66, inclusive of their brief) that touches upon or involves the question of concurrent negligence. All of the cases cited under this head go to the assumption of risk where only the negligence of the master is involved. We agree that the law is that plaintiff ordinarily does not assume the negligence of the master, unless the defects or negligence of the master are known to him, or are so obvious and patent that a reasonably prudent man should have known of them. The cases cited by plaintiff go no further than this. As a matter of fact they also sustain the dictrine that where the defects are open and obvious and are known or should have been known by the plaintiff in the exercise of reasonable care, then the plaintiff is held to have assumed the risk.

The first case cited by plaintiff is that of Williams v. Bunker Hill & S. M. Co., 200 Fed. 211. This case is one in which an employee knew that a wire was charged but testified that he thought it would only sting him and did not know that there was enough power to do him any harm. It was held

that it could not be said, as a matter of law, that he assumed the risks.

The second case is that of Chicago, B. & Q. R. Co., v. Shalstrom, 195 Fed. 725. This is the only case of plaintiff from which we will quote, but they all agree as to the following holding, and in that we concur:

> "A servant, by entering and continuing in the employment of the master without complaint assumes the ordinary risks and dangers of the employment and the extraordinary risks and dangers which he knows and appreciates.
>
> "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet, if the negligence of the master or its effect is known and appreciated by the servant, or is "so patent as to be readily observed by him by the reasonable use of his senses having in view his age, intelligence, and experience", and he enters or continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes.
>
> "When a defect is obvious or "so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience," and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them.
>
> "The direct order of the master or the foreman to the servant to work at a specified place, or with certain appliances, does not release him from his assumption of the apparent risks and dangers of the defects in the place, structure, or

> appliances that are "so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience."

The third case is that of National Steel v. Hore, 155 Fed. 62. No negligence of fellow-servant is alleged or proven. Therefore there is no question of concurrent negligence. In that case the court simply held that plaintiff could not as a matter of law in that particular case be held to have realized the dangers.

The fourth case, Bunker Hill & S. M. Co. v. Jones, 130 Fed. 813, has no question of concurrent negligence involved. The master failed to furnish a reasonably safe place in a mine in that the roof was not safe, and it was held in that case that plaintiff had no sufficient knowledge of the same as to defeat his right of recovery.

In the fifth case, that of City of Puget Sound v. Harrigan, 176 Fed. 488, the plaintiff calls the court's attention especially. We have been unable to find where the same is at all in point as there is no question of a fellow servant involved. The conductor of a railroad train stepped off the train in performance of his duties onto what he thought was a platform, and it was held that owing to the insufficient lights, etc., the plaintiff did not realize the

dangers and was therefore excusable in his mistake of judgment.

The fifth case, is the case of New York, N. H. & H. R. Co. v. Vizvari, 210 Fed. 118, wherein it was held that plaintiff did not assume the risks of an instrument that he had been ordered to use.

The other cases cited by the plaintiff are state decisions which we will not specially refer to, but in them we assert there is no question of concurrent negligence involved but only a question of assumption of risk or some defect that the master was guilty of.

If there was no question of fellow servant we can see how the plaintiff might have cited the above cases to attempt to prove that he did not assume the risks of the defective track, although under these decisions it is clear that some courts would have held that under the case at bar the plaintiff had assumed the risk of the defective track because it was a defect open and obvious and concerning which he not only proved, but had alleged, knowledge of the same, and it was such an obvious defect and the work carried on was of such a nature that, as the court below said, even a child would be held to have appreciated the dangers arising therefrom.

CONCURRENT NEGLIGENCE.

Under the pleadings and the evidence in this case there could be no concurrent negligence. Concurrent negligence of the master and fellow-servant means that if there is negligence on the part of the master which would give the plaintiff a cause of action, and a fellow servant by some negligence concurs with the negligence of the master the negligence of the fellow servant will not *defeat* the action of the plaintiff. The negligent act of the fellow servant does not *add* to the cause of action of the plaintiff. It is not a part of his cause of action. Of course, ordinarily no plaintiff would plead the negligence of the fellow servant. The servant under ordinary circumstances assumes the negligence of a fellow servant. If the plaintiff alleges the two grounds of negligence, to-wit, the negligence of the master and the negligence of the fellow servant and fails to prove the negligence of the fellow servant and does prove the negligence of the master, he can recover; but if he fails to prove the negligence of the master and proves the negligence of the fellow servant he cannot recover. If he alleges negligence of the master and negligence of the fellow servant and proves that the negligent act alleged against the master was assumed by him his cause of action is defeated. The plaintiff at bar alleged the negligence

of the master and the negligence of the fellow servant, but proved that he knew at least of the negligence of the master, and under the evidence he clearly assumed the risks of such negligence. He will not be permitted to recover on the ground of the negligence of his fellow servant because this is one of the risks that a servant assumes. While, the negligence of a fellow servant will not be permitted to defeat a cause of action if the master was also negligent; it will not make a cause of action if the negligence of the master is obvious and apparent and thus assumed.

AUTHORITIES ON CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.

In the case of Jones v. Milwaukee Electric Railway & Light Co., 133 N. W. 636, the Supreme Court of Wisconsin has recently reversed a case and instructed that a verdict should be rendered for the defendant, wherein the facts are so similar to the case at bar that we feel that the reasoning of that court is very pertinent to the facts in the case at bar. This is a very recent case. The court states the facts as follows:

> "George A. Jones, a conductor on an interurban service * * * was killed * * * by being crushed between the wall of defendant's building and the handhold for the rear entrance

to one of its cars. * * * The verdict found that the car was suddenly and negligently started by the motorman without giving the usual signal, and that this was a proximate cause of the injury. It further found that the defendant failed to furnish to the defendant a reasonably safe place in which to work, and that such failure was a proximate cause of the injury. In and by the answer to the ninth question submitted, it was found that the deceased at and prior to the time of his injury knew of the dangers incident to his employment by reason of the failure to furnish a safe place in which to perform his duties. In answer to the tenth question the jury found that the failure of the deceased to exercise ordinary care did not in any degree proximately contribute to his injury. * * * and was not guilty of any negligence which directly contributed to his injury."

In this case the plaintiff claimed:

"That the assumption of risk so far as it is applicable to an unsafe place only includes those risks which arise from the proper, and not those which arise from the negligent operations of a fellow servant, even where the fellow servant is not performing a duty which the law casts on the master. Hence that, if plaintiff by actual knowledge of a defect or ample opportunity to know of an obvious danger assumed the risk arising therefrom, he did not assume the risk arising from the negligent act of a fellow servant acting jointly with the known unsafe place to produce the injury."

As we will see, that contention is identical with the contention of plaintiff in this case, but the court in that case said:

"But the rule which absolves the master

from liability where the injury is caused by the negligent act of a fellow servant of the injured is based on the theory that each servant assumes all risk of negligent injury by a competent fellow servant. So the logic of this question would lead to the conclusion that, where an employe was injured by the action of one assumed risk, he could not recover, but, if injured by the concurrent action of two assumed risks, he could recover. This is like adding two nothings to make something."

Anthony v. Leer, et al, 12 N. E. 561. In this case the plaintiff sought to recover damages by reason of falling thru a trap door in the floor opened without his notice by a fellow servant. In reversing the case and holding that an instructed verdict should be given for the defendant the court says:

"The negligence of the defendants, if any exists, must be found either (1) in the location of the trap-door in the passage-way; or (2) in failing adequately to protect or guard it. It is a complete answer to the claim of negligence in these respects that the plaintiff had full knowledge of the situation and of the arrangements for the protection of persons using the passage-way; and that, by continuing in the employment, he assumed the risks and hazards incident to the situation, and especially such hazards as might result from the non-observance by co-employes of directions designed for the protection of persons using the passage-way. The dangers to which the plaintiff was exposed were known and obvious. It is not the case where an inexperienced or uninstructed employe may know the facts, but may be incapable of drawing the proper inferences, or appreciating the dangers. The plaintiff was as fully

competent to understand the risks from the location of the trap door and its use, and from negligent conduct of persons employed in the planing-room, as were the defendants. The location of the trap-door in the passage-way was not per se a wrongful act. The defendants had a right to arrange their own premises in any way which suited their convenience, and were not bound to change the arrangement to secure greater safety to the employees. If the trap-door was not open to observation, or its existence was not known to those whose duty required them to use the passage-way, or if the defendants had omitted to give proper instructions to those employed in the planing-room, a different question would be presented. The general rule, that the servant takes the risk of obvious dangers connected with his employment, has been so fully considered in recent cases that further discussion is unnecessary."

In the case of Murch v. Thomas Wilson's Sons & Co., 47 N. E. 111 the Supreme Court of Massachusetts holds:

"A pilot was furnished a stateroom, but was told that he might warm himself and rest in a small deck-house used for charts. In such deck house there was a stove burning a patent fuel, and having no pipe to carry the smoke or gas from the room. The pilot was told to leave the door open, to avoid possible danger from the fumes of the stove. While in the room with the door partly open, he noticed no smoke or gas from the stove. He went to sleep there, leaving the door open, but it was afterwards closed by a fellow servant, and the pilot was injured by asphyxiation. Held, that the risk was assumed."

In the case of O'Neill v. G. N. R. R. Co., 82 N. W. 1086, the Supreme Court of Minnesota considered the question of concurrent negligence. In this it was claimed that plaintiff was injured by leaving a long spike or bolt in a timber and that the leaving of the spike in the timber was due to the negligence of a fellow servant. The court held that plaintiff was a man of experience, that he did not know of the protruding bolt that caused the accident, but that he did know the manner of conducting the work in which he was engaged and the peculiar dangers that arise from the demolition of the portion of the bridge structure which was being taken apart and removed, and that these dangers were obvious to anyone who could use his senses and that he assumes the risks in connection with the other hazards of the undertaking in which he was engaged of the negligence of a fellow servant working with him.

THE PLAINTIFF ASSUMES THE RISKS OF DEFECTS THAT ARE OPEN AND OBVIOUS. HE ASSUMES THE RISK OF A FELLOW SERVANT'S NEGLIGENT ACTS. WHEN THESE TWO CONCUR HE NATURALLY ASSUMES THEM BOTH.

The evidence shows that loads of lumber were apt to fall over on a smooth track and without any negligence on the part of the employer. There nec-

essarily was some distance between the edge of the rails on the transfer car and the end of the rails on the transfer platform. This opening, together with the fact that the transfer car was movable, would cause some jar to the loads as they went upon the transfer car. Even if the plaintiff had not known of the unevenness of the track it seems he was guilty of contributory negligence is assuming the position he did with his back to the load when the truck was being moved from the transfer platform onto the car. How much more conclusive is his contributory negligence when it is taken into consideration the fact that he knew of the unevenness of the track and could, or should have known of the absence of the crosspieces omitted therefrom by a fellow servant, and when he was working at the side of said load in violation of the rules and with his back to the load, not only in violation of the rules, but in violation of the dictates of reasoning that a man should use to avoid injury to himself. It is not shown that crosspieces would have prevented the load from falling had they been in the load, and we cannot see under any view of the evidence in this case where the plaintiff has alleged or proven a cause of action, and respectfully submit that the lower court could have done

nothing else under the evidence and pleadings as they existed but to have sustained the motion of the defendant for an instructed verdict.

Respectfully submitted,

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